IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 29, 2007

ALBERT BENDER ET AL. v. NASHVILLE ELECTRIC SERVICE ET AL.

Appeal from the Chancery Court for Davidson County
No. 05-355-II Carol McCoy, Chancellor

No. M2006-02509-COA-R3-CV - Filed February 14, 2008

In February 2005, Davidson County residents sued the Nashville Electric Service and two of its representatives for damages allegedly caused by the removal of trees from their property. As of May 2006, the case had not been set for trial as required by Local Rule 18.01 and the trial court dismissed the cause for residents' failure to prosecute pursuant to Tenn. R. Civ. P. 41 in October 2006. Residents appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Albert Bender, Antioch, Tennessee, Pro Se.

C. Dewey Branstetter, Jr., and Eugene W. Ward, Nashville, Tennessee, for the appellants, Nashville Electric Service, Bill Matheson and Preston Marsh.

OPINION

Albert Bender and Melanie Bender ("Plaintiffs" or "the Benders") reside in Antioch, Tennessee in Davidson County. On February 8, 2005, the Benders filed a *pro se* complaint against Nashville Electric Service and its representatives ("Defendants" or "NES")[1] alleging that NES wrongfully cut and removed trees from Plaintiffs' property and seeking compensatory and punitive damages. The Benders believed NES employed disparate tree trimming and vegetation removal practices against them because of their race. The Defendants answered the complaint on April 19, 2005, denying the Benders' claims and asserting a number of special defenses. No further action was taken in the case until 2006.

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[1]The Appellees in this case are defendants Bill Matheson, Preston Marsh, and the Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board, which is commonly referred to as "Nashville Electric Service," or "NES." For convenience, we refer to Appellees collectively as "Nashville Electric Service," or "NES."

Nearly a year after the Benders filed their complaint, the Davidson County Clerk and Master notified the Benders that their case would be dismissed in accordance with Local Rule 18.01 on February 8, 2006 unless the matter was set for trial. The Local Rules of Practice for the Twentieth Judicial District provide that "[a]ll civil cases must be concluded or an order setting the case for trial obtained within twelve (12) months from date of filing unless the court has directed a shorter or longer period." 20th Jud. Cir. R. 18.01. These local rules also provide that, "[t]o expedite cases, the court may take reasonable measures *including dismissal* or entering a scheduling order to enforce the time standard set forth above." 20th Jud. Cir. R. 18.02 (emphasis added).

On February 13, 2006, the Benders made a motion to set the matter for trial. Defendants responded with a request that the court enter a scheduling order setting a trial date and deadlines for discovery and for filing dispositive motions. On April 10, 2006, the Chancellor ordered that the parties draft and submit a scheduling order including an agreed trial date by May 1, 2006 or "the case will be dismissed." In a separate order dated May 10, 2006, the parties were again ordered to submit a scheduling order with a trial date on or before May 30, 2006; otherwise, "the case will be dismissed."

On the day the scheduling order was due, Plaintiffs sought an extension of time until June 30, 2006, claiming that "the parties have been missing telephone calls to confer on this case." It appears that a hearing on the motion was set for June 16, 2006, however, no scheduling order was ever entered and no trial date was set as of October 9, 2006. The court dismissed the Benders' case pursuant to Tenn. R. Civ. P. 41 and taxed court costs to the Plaintiffs. The Benders appeal and argue that the trial court erred in dismissing their complaint pursuant to Rule 41 of the Tennessee Rules of Civil Procedure because it acted *sua sponte*, on its own accord.

A decision to dismiss for failure to prosecute pursuant to Tenn. R. Civ. P. 41.02 is within the sound discretion of the trial court and will not be reversed unless the court abused its discretion. *Osagie v. Peakload Temporary Svs.*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002); *White v. College Motors, Inc.*, 370 S.W.2d 476 (Tenn. 1963). A court abuses its discretion if it acts unreasonably, arbitrarily, or unconscionably and we will not disrupt the trial court's decision to dismiss in the absence of such a showing. *Hodges v. Attorney Gen.*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000).

The Tennessee Rules of Civil Procedure allow for the involuntary dismissal of an action or claim if a plaintiff fails to prosecute or to comply with the rules and orders of the court. Tenn. R. Civ. P. 41.02. Specifically, the rule states that "[f]or failure of the plaintiff to prosecute or to comply with [the Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." Tenn. R. Civ. P. 41.02(1). Although the language of the rule mentions only "a defendant," Rule 41.02 has long been construed expressly to authorize a trial court to order the involuntary dismissal of an action *sua sponte* in certain circumstances and upon adequate grounds. *Harris v. Baptist Mem'l Hosp.*, 574 S.W.2d 730, 731 (Tenn. 1978); *Hessmer v. Hessmer*, 138 S.W.3d 901, 904 (Tenn. Ct. App. 2003); *Hodges*, 43 S.W.3d at 921. The authority granted by Rule 41.02 is "necessary to enable the court to manage its own docket, and to protect defendants against plaintiffs who are unwilling to put their claims to the test, but determined to subject them to the continuing threat of an eventual judgment." *Osagie*, 91 S.W.3d at 329.

In this case, the Clerk and Master explicitly informed the Benders on January 5, 2006 that their "case will be dismissed on February 8, 2006, pursuant to Local Rule 18, unless an order is entered setting the case for trial or disposing of it." Thereafter, the court warned that the case would be dismissed if no trial date was set in separate orders dated April 10, 2006 and May 10, 2006. Despite the warnings, the Benders did not effectuate a scheduling order nor did they set the case for trial within 12 months of filing as required by Local Rule 18.01 or as required by orders of the court. As a result, the court, acting under the authority of Tenn. R. Civ. P. 41.02(1) and Local Rule 18.02, ordered the involuntary dismissal of the case for the Benders' failure to prosecute the cause.

We note that litigants appearing before the court are entitled to fair and equal treatment, whether appearing *pro se* or represented by counsel. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). To ensure fairness and equal treatment, all parties must abide by the same rules of the court. While the Benders have chosen to represent themselves in this matter, they must comply with the same substantive and procedural law as NES, which is represented by counsel.[2] *See, e.g., Hessmer*, 138 S.W.3d at 903; *Hodges*, 43 S.W.3d at 920; *Edmundson v. Pratt*, 945 S.W.2d 754, 755 (Tenn. Ct. App. 1996).

We find no evidence to suggest the trial court's dismissal was arbitrary, unreasonable, or unconscionable. On the contrary, the record reveals the Benders were given every opportunity to comply with the rules and orders of the court but failed to do so. The order of involuntary dismissal for failure to prosecute was well within the discretion of the trial court. Judgment of the Chancery Court for Davidson County is affirmed. Costs of appeal are assessed against Appellants Albert Bender and Melanie Bender, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

[2]In at least two letters to NES sent in 2004, Mr. Bender says he is an attorney and previously served as a judge. In one letter, however, Mr. Bender noted that he was seeking admission to practice law in the State of Tennessee but does not claim to be an attorney in any of the filings in this matter or in his brief on appeal.